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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD LEE GRIFFIN, Defendant and Appellant.	B297212 (Los Angeles County Super. Ct. No. TA109162)

APPEAL from an order of the Superior Court of Los Angeles County. Pat Connolly, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters and Susan Sullivan Pithey, Assistant Attorneys General, Idan Ivri and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Donald Lee Griffin (defendant) appeals from the summary denial of his petition for resentencing pursuant to Penal Code section 1170.95.[1] He contends that he was entitled to the appointment of counsel before the trial court's determination of ineligibility under the statute. Defendant also contends that the trial court erred in relying on the appellate opinion affirming his conviction to find him ineligible as a matter of law. Finding no merit to defendant's contentions, we affirm the order.

BACKGROUND

Senate Bill No. 1437 (S.B. 1437)

The Legislature passed S.B. 1437 in 2018 in order to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).)[2]

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] The felony-murder rule imposed murder liability on a defendant for a killing by an accomplice during the commission, or attempted commission, of an inherently dangerous felony, without proof of intent to kill, or even implied malice, so long as the defendant intended to commit the underlying felony. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) Under the natural and probable consequences doctrine, a "'person who knowingly aids and abets criminal conduct is guilty of not only the intended [target] crime . . . but also of any other crime the perpetrator actually commits . . . that is a natural and probable

S.B. 1437 amended sections 188 and 189. As amended, section 188 limits a finding of malice, as follows: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) Subdivision (e) of section 189 now reads: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

> "(1) The person was the actual killer.
>
> "(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
>
> "(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

S.B. 1437 added section 1170.95, which permits a person convicted of murder, but who could not have been convicted of murder under the amended statutes, to petition the court to vacate the murder conviction and resentence the petitioner on the remaining charges, or if "murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony

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consequence of the intended crime.'" (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

for resentencing purposes." (§ 1170.95, subds. (a)-(e).) Among other requirements, section 1170.95, subdivision (b)(1) provides:

> "The petition shall include all of the following:
>
> "(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).
>
> "(B) The superior court case number and year of the petitioner's conviction.
>
> "(C) Whether the petitioner requests the appointment of counsel."

Defendant's murder conviction

In 2012, defendant was convicted of murder and two counts of attempted willful, deliberate, and premeditated murder, after a jury trial.[3] The jury found true the allegation that in committing the crimes, defendant personally used a firearm, and personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b) and (c) respectively. The jury also found true the allegation that defendant personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d). (*Griffin I, supra*, B234979.) The trial court sentenced defendant to a total term of 109 years to life in prison, which included 25 years to life for the murder, plus 25 years to

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[3] We granted defendant's request for judicial notice of our opinion affirming defendant's 2012 convictions where we summarize the relevant background. (See *People v. Griffin* (Nov. 28, 2012, B234979) [nonpub. opn.] (*Griffin I*).)

life for the firearm enhancement of section 12022.53, subdivision (d). (*Ibid*.)

The evidence at defendant's 2012 trial showed that defendant was the actual shooter and had no accomplice. Defendant had arranged a meeting with two prostitutes at the house of their pimp, Dirk Jackson. The two women agreed to have sex with him for $150, which he paid upon arrival. One woman took the money to Jackson in a back room, took the gun that defendant carried, placed it in a basket in the living room, and then had sex with him. When they finished, defendant had sex with the other woman. When he was told by the first woman to hurry, that his hour was almost up, defendant began acting nervously and demanded his money back. When she refused to refund his money, defendant became "loud and crazy," and said he intended to take it back. Defendant retrieved his gun from the basket, waved and pointed the gun at them, and screamed that he was going to kill them. When Jackson emerged from the back room, defendant fatally shot Jackson, and then shot one of the women. Though he fired at the other woman, the shot missed her.[4]

Petition for resentencing

In March 2019 defendant filed a petition in the trial court for resentencing under section 1170.95, in which he alleged that he was convicted of murder under the felony-murder rule or the natural and probable consequences doctrine, and could not now

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[4] Defendant testified that initially Jackson had the gun, over which the two men struggled. Jackson fired two shots which missed before defendant was able to take the gun away from him. As Jackson advanced, defendant shot him. Defendant claimed that he fired just once, and denied shooting at the two women.

be convicted of murder because of the changes to sections 188 and 189, effective January 1, 2019. The trial court summarily denied the petition, explaining its ruling as follows: "The appellate opinion affirming petitioner's conviction and sentence reflects that the petitioner was the actual killer and was convicted of murder on a theory of being the direct perpetrator and not on a theory of felony murder of any degree, or a theory of natural and probable consequences." Defendant filed a timely notice of appeal from the order.

DISCUSSION

Defendant contends that the trial court erred by basing its denial solely on our opinion in *Griffin I*, without first appointing counsel for defendant and requesting additional briefing.

Subdivision (c) of section 1170.95 sets forth the procedure to be followed by the trial court upon receipt of a petition, as follows:

> "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

Defendant acknowledges that section 1170.95, subdivision (c) calls for two separate prima facie determinations by the court, and that the first is a threshold showing that the petitioner falls

within the provisions of the statute. Defendant contends that this initial determination involves no more than a review of the several required factual allegations in the petition, and that his petition satisfied the threshold prima facie showing because it alleged that he was convicted of murder and could not be convicted of murder under the amended statutes.

We disagree. The form petition contains the following three allegations: "1. A complaint, information, or indictment was filed against me that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine"; "2a. At trial, I was convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine"; and "3. I could not now be convicted of 1st or 2nd degree murder because of the changes made to Penal Code [sections] 188 and 189, effective January 1, 2019." The form petition had boxes to check for the allegations that the petitioner was convicted as a participant in a crime resulting in death and was not the actual killer, but those were left unchecked. The form also left unchecked the allegation that the conviction was for second degree murder under the natural and probable consequences doctrine.

Such allegations or lack thereof did not give the trial court enough information to determine which conviction defendant suffered or whether the conviction fell within the provisions of section 1170.95. Subdivision (b)(2) of section 1170.95 provides that if any of the required information is missing and cannot be "*readily ascertained* by the court, the court may deny the petition without prejudice to the filing of another petition." (Italics added.) It stands to reason that the information most readily ascertainable by the trial court would be in the record of

conviction. Appellate opinions are part of the record of conviction. (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110.)

Other appellate courts have recently concluded that the initial determination of whether a petitioner's conviction falls within the statutory requirements for resentencing, should be based upon the record of conviction, in addition to the allegations of the petition. (See *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137-1138 (*Lewis*), review granted Mar. 18, 2020, S260598; accord, *People v. Verdugo* (2020) 44 Cal.App.5th 320, 333 (*Verdugo*), review granted Mar. 18, 2020, S260493.) In *Lewis*, the court compared section 1170.95's initial determination to the procedure followed for resentencing petitions filed pursuant to section 1170.18 (enacted by Proposition 47) where the "court undertakes an "'initial screening'" of the petition to determine whether it states "'a prima facie basis for relief.'" [Citation.] In evaluating the petition at that stage, the court is permitted to examine the petition 'as well as the record of conviction.' [Citation.]" (*Lewis, supra*, at p. 1137, quoting *People v. Washington* (2018) 23 Cal.App.5th 948, 953, 955.) The court also compared the initial determination to the procedure followed for resentencing petitions under section 1170.126, enacted by Proposition 36, where the trial court can review the petitioner's conviction to determine whether the petitioner's initial burden to establish "'a prima facie case for eligibility'" has been met. (*Lewis, supra*, at p. 1138, citing *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341.)

We agree with *Lewis* that the other resentencing statutes provide persuasive guidance. When the meaning of a statute is in doubt, it should be construed with a view to the entire statutory scheme of which it is a part. The courts should also

look to other considerations, such as public policy and expressions of legislative purpose. (See *People v. Zambia* (2011) 51 Cal.4th 965, 972.) One stated legislative purpose of S.B. 1437 was "to ensure that murder liability is not imposed on a person who is not the actual killer." (Stats. 2018, ch. 1015, § 1(f).) As the *Lewis* court observed, "Allowing the trial court to consider its file and the record of conviction is also sound policy. . . . 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. . . . [I]t would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.' [Citation.]" (*Lewis, supra*, 43 Cal.App.5th at p. 1138.) Thus, summary denial is appropriate where a review of the record of conviction establishes that the petitioner is ineligible for relief as a matter of law, because his conviction remains valid notwithstanding the amendments to sections 188 and 189. (See *Verdugo, supra*, 44 Cal.App.5th at p. 330.)

When it appears from the record of conviction that the petitioner is ineligible for relief as a matter of law, the trial court is not required to appoint counsel before summarily denying the petition. (*People v. Cornelius* (2020) 44 Cal.App.5th 54, 58, review granted Mar. 18, 2020, S260410; *Verdugo, supra*, 44 Cal.App.5th at pp. 332-333; *Lewis, supra*, 43 Cal.App.5th at pp. 1139-1140.) "Of course, if the petitioner appeals the superior court's summary denial of a resentencing petition, appointed counsel on appeal can argue the court erred in concluding his or

her client was ineligible for relief as a matter of law." (*Verdugo*, at p. 333.) Here, counsel does not argue that the court's conclusion was erroneous. A petitioner who was the actual the killer and who was found to have personally and intentionally discharged a firearm causing the victim's death, within the meaning of section 12022.53, subdivision (d), is ineligible for resentencing under section 1170.95. (*Cornelius, supra*, at p. 58.)

We conclude the trial court properly considered the record of conviction, including the appellate opinion affirming defendant's conviction, which shows that defendant was the actual killer and who was found to have personally and intentionally discharged a firearm causing the victim's death, within the meaning of section 12022.53, subdivision (d). Defendant is thus ineligible for resentencing under section 1170.95 and the trial court was not required to appoint counsel.

DISPOSITION

The order denying defendant's petition for resentencing under section 1170.95 is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT